

## American Rescue Plan Act Funded Projects and Expenses Treasury Department Issues Final Rule Governing Use of ARPA Funds

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### Regulatory History and Issuance of the Final Rule

The U.S. Treasury Department has released its Final Rule governing the use of State and Local Fiscal Recovery Funds (SLFR Funds), made available to state and local governments through the American Rescue Plan Act (ARPA). Since passage of ARPA in March 2021 and the distribution of the first tranche of ARPA funds in or around May 2021, communities have been planning for and spending ARPA funds under the regulatory guidance provided pursuant to the U.S. Treasury Department's Interim Final Rule, which we explained in detail in our November 15, 2021 eUpdate. On January 6, 2022, the Treasury Department issued its Final Rule governing state and local governments' use of SLFR Funds, the text of which is available [here](#).

While substantially similar to the Interim Final Rule, the Final Rule includes some important changes to the Interim Final Rule that are based upon comments submitted during the notice and comment period for the Interim Final Rule. Here, we have updated our November 15, 2021 eUpdate with a summary of the significant changes incorporated into the Final Rule. The discussion in the original, November 15, 2021 eUpdate of all eligible uses has been retained and follows the overview of the Final Rule immediately below.<sup>1</sup>

- I. **Lost Revenue – \$10 Million Standard Allowance**: SLFR Funds may be used for the provision of “government services” in an amount equal to the reduction in the recipient’s lost revenue in fiscal years 2020 to 2023. To determine a community’s lost revenue, Treasury created a somewhat complex formula in the Interim Final Rule that involved comparing actual annual revenue to estimated revenue based on average revenue growth over the past three fiscal years. Treasury received many comments that the calculation was too complex and did not take into account all revenue streams, and responded by incorporating the so-called “standard allowance” into the Final Rule. Final Rule, §35.6(d)(1). **Now, any recipient can elect to take a standard allowance of up to \$10 million, which will be deemed the funding recipients lost revenue for the entire period of performance (March 3, 2021 to December 31, 2024).** This is a one-time election, and once made a recipient cannot elect to calculate and cover actual lost revenue with ARPA funds later. For many smaller communities, this means all of their SLFR Funds may be allocated for the provision of “government services.”

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<sup>1</sup> All of the eligible uses contained in the Interim Final Rule, described in Section V, below, remain in the Final Rule. The Final Rule has only clarified or expanded the requirements or scope of existing eligible uses. Therefore, the information contained in Sections I-IV of this eUpdate supplements, but does not replace, the information contained in Section V.

- II. Premium Pay – Presumptive Eligibility for Employees Not Exempt from FLSA Overtime Provisions:** ARPA funds may be used to provide premium pay that “responds to eligible workers performing essential work.” Treasury has defined each of those three elements. All municipal employees are “eligible workers,” and “essential work” is any work performed in-person (i.e. not from home) and that involves regular interaction with the public or the regular handling of items handled by the public. Under the Interim Final Rule, premium pay would presumptively “respond to” such workers if it were provided to low- and moderate-income workers, meaning those whose income is at or below 150% of the mean state or county income (whichever is greater). After receiving comments that this threshold was too restrictive and administratively burdensome, **Treasury expanded the types of employees presumptively eligible for premium pay to include employees not exempt from the overtime provisions of the FLSA. Final Rule, §35.6(c)(2).** It is important to note, however, that this is merely a presumption for purposes of satisfying the “responds to” component of a premium pay program; ARPA recipients may still provide premium pay to higher income workers that are exempt from the FLSA’s overtime provisions if it provides written justification for such pay to Treasury.
- III. Eligible Water and Sewer Infrastructure Investments Expanded:** ARPA funds may be used to make necessary investments in water, sewer, and broadband infrastructure. With respect to water and sewer infrastructure projects, the Interim Final Rule incorporated the requirements of the EPA’s Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) programs. However, Treasury received many comments requesting additional flexibility to use ARPA funds for water and sewer projects local officials deem necessary, and the Final Rule now provides that additional flexibility.
- a. **Sewer Projects:** Under the Final Rule, ARPA funds may be used for sewer projects regardless of their impact on the drinking water supply (a critical component of stormwater project eligibility under the CWSRF), so long as the project otherwise complies with certain provisions of the Federal Water Pollution Control Act. Final Rule, §35.6(e)(1)(ii).
  - b. **Drinking Water Projects:** Treasury has expanded the types of projects that are eligible for those serviced by private wells. While projects connecting homes serviced by private wells to a public water supply system and those addressing installation, repair, and replacement of private septic systems were already eligible under the Interim Final Rule, communities may now use ARPA funds for rehabilitation, testing, and treatment and remediation for private wells. Final Rule, §35.6(e)(1)(vii).
  - c. **Population Growth:** The Final Rule permits ARPA funds to be used for water projects needed to serve anticipated population growth, with certain conditions, Final Rule, §35.6(e)(1)(v), contrary to the DWSRF requirement that projects eligible for that program be designed to serve the existing population (i.e. not be based on anticipated future growth.)
- IV. Public Health and Negative Economic Impact Measures:** Recipients may use ARPA funds for capital expenditures, programs to improve public health services, and to address the negative economic impacts of the COVID-19 pandemic. Under the Interim Final Rule, one negative economic impact that could be addressed with ARPA funds were those resulting in public sector layoffs, and therefore one eligible use of ARPA funds was payroll and associated costs to support the public sector workforce by hiring or rehiring staff to fill

budgeted positions that existed on January 27, 2020. Treasury received comments concerning historic underinvestment in the public sector workforce and the need to hire above previous levels, and now **recipients may use ARPA funds to increase the number of budgeted, full-time employees above the number that existed as of January 27, 2020.** This increase is limited to the difference between full time employees as of January 27, 2020 multiplied by 1.075 and full-time employees as of March 3, 2021. Final Rule, §35.6(b)(3)(ii)(E)(2)(ii). However, recipients must elect to use ARPA funds either to hire and rehire up to past levels, or to increase staffing as noted; recipients cannot use ARPA funds for both purposes.

Finally, Treasury clarified and expanded the types of capital expenditures recipients could make with SLFR Funds to support those impacted by COVID-19. Recipients may use ARPA funds for capital expenditures that serve “impacted” or “disproportionately impacted” households and businesses, and the Final Rule expands the set of households presumed to be “impacted” by the pandemic to include the general public. Final Rule, §35.6(b)(2)(ii). Moreover, the Final Rule includes an expanded list of the types of assistance and relief that may be provided, the list now including programs that make affordable housing, childcare, and early learning services available in “impacted” communities, Final Rule, §35.6(b)(3)(ii)(A)(3)&(5), and funding community development and neighborhood revitalization programs in “disproportionately impacted” communities. Final Rule, §35.6(b)(3)(ii)(A)(11)(iv).

**V. Eligible Uses:** Below we have provided a list of eligible uses under the IFR. It is important to note this is a summary list, and some items have been combined or summarized for conciseness and ease of reference. When actually relying on a listed eligible use or designing an ARPA-funded program, it is critical the full text of the IFR, and perhaps legal counsel, be consulted. The eligible uses of ARPA funds are:

- **Responding to the COVID-19 public health emergency and its negative economic impacts:**
  - Expenses related to vaccination programs and clinics and COVID-19 testing, monitoring, and contact tracing (e.g. staff, equipment and supplies, facilities, IT, and administrative expenses);
  - COVID-19-related expenses of public hospitals, temporary medical facilities, clinics, congregate care facilities, long-term care facilities, incarceration settings, homeless shelters, and group living facilities;
  - COVID-19- related emergency medical, transportation, and telemedicine expenses;
  - Expenses related to provision and distribution of personal protective equipment, sanitizing products, and supplies and equipment (including ventilation upgrades) to mitigate the risk of spreading COVID-19;
  - Expenses for quarantining and isolating individuals, including providing paid sick and paid family and medical leave to public employees; and
  - Expenses related to the treatment of long-term symptoms, mental health treatment, and behavioral health services related to COVID-19.
- **Payroll and covered benefits for:**
  - Public safety, public health, human services, and similar employees to the extent the employee’s time is spent mitigating or responding to COVID-19; and
  - New employees hired to increase staffing to the level of employees employed as of January 27, 2020.
- **Unemployment Benefits and Support:**
  - Assistance and job training for individuals who are unemployed or underemployed; and

- Contributions to the state unemployment insurance trust fund up to the level required to restore the fund to its balance as of January 27, 2020.
- **Addressing Negative Economic Impacts:**
  - Support to small businesses and nonprofits (e.g. loans, grants, in-kind assistance, technical assistance, and other services) that responds to the negative economic impacts of COVID-19;
  - Assistance to households, including cash assistance programs, that responds to the negative economic impacts of COVID-19; and
  - Aid to impacted industries, such as tourism, travel, hospitality, and other impacted industries, that responds to the negative economic impacts of COVID-19.
- **Improvements to Public Health or Economic Relief Programs:**
  - Administrative costs associated with these services and programs, including data reporting and IT improvements.
- **Infrastructure Investments:**
  - Investments in water, sewer, and broadband infrastructure;
  - Water and sewer projects must be eligible under certain sections of the Federal Water Pollution Control Act or Safe Drinking Water Act; and
  - Broadband infrastructure must be designed to reliably provide a certain level of service (e.g. 100 Mbps upload/download speed).
- **Miscellaneous:**
  - Providing premium pay to essential workers or grants to certain employers that provide premium pay to essential workers, with priority of premium pay provided to low- and moderate-income workers;
  - Survivor's benefits for family members of those who have died of COVID-19; and
  - Programs, social services, educational improvements, or other assistance to disproportionality impacted populations, meaning those in "Qualified Census Tracts."<sup>2</sup>

**VI. Recoupment:** Misuse of ARPA funds could subject the funding recipient to recoupment. The Treasury Department will be monitoring use of APRA funds and enforcing the Act's and the IFR's requirements with respect to the use of ARPA funds through 2026. While the precise level of oversight and standards by which Treasury enforces these requirements is currently unknown, Treasury has outlined in the IFR the process by which it will seek to recoup improperly spent ARPA funds. Therefore, we strongly recommend strict compliance with the eligible uses outlined in the IFR.

In general, any ARPA funds used in violation of the Act or the IFR will be subject to recoupment **prior to December 31, 2026**. Recoupment may occur if Treasury finds or is notified, by any person, that an ARPA funding recipient has used CSLFR Funds in violation of the eligible use and lost revenue provisions of the IFR. The primary means by which Treasury will identify misuses of ARPA funds is through reporting provided by

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<sup>2</sup> "Any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent." 26 U.S.C. 42(d)(5)(B)(ii)(I).

recipients. Recipients will be required to report ARPA funding expenditures quarterly, however, Treasury will also consider information from other sources, including members of the public.

Where Treasury identifies a misuse of ARPA funds, it will send the recipient a Notice of Violation. The Notice of Violation will identify and explain the amount of ARPA funding it has deemed misused and subject to recoupment. A recipient issued a Notice of Violation may request reconsideration of any amounts identified in the Notice of Violation. The recipient may provide additional information concerning the use of ARPA funds or its calculation of its tax revenue, and Treasury thereafter will consider whether the Notice of Violation was properly issued and the amount appropriate for recoupment, if any. A request for reconsideration must be submitted with **60 calendar days of the Notice of Violation**, and Treasury will respond with a decision to affirm, withdraw, or modify the Notice of Violation within **60 calendar days of receipt of the request for reconsideration**. Finally, payment of amounts subject to recoupment must be made within 120 calendar days of the initial Notice of Violation, if no request for reconsideration is made, or 120 calendar days of the final Notice of Violation if reconsideration is requested.

This eUpdate is designed to provide a broad overview of the ARPA funding process and eligible uses, but should not be relied on exclusively to make ARPA funding decisions. As noted above, even if a use is generally eligible, the manner in which the expenditure is made must still comply with all of the terms and conditions of ARPA funding, and must be properly reported to Treasury. If you have any questions concerning whether a particular use is eligible or have been issued a Notice of Violation, please do not hesitate to contact your KP Law contact at (617) 556-0007.

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